PEMBENAAN HASHBUDIN (M) SDN. BHD.

v.

THAMBIPILLAI SIVAGNANAM & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[ORIGINATING MOTION NO. R8-32-110 OF 1987]
26 AUGUST 1988

LABOUR LAW: *Order for certiorari - Requirement for inquiry before dismissal discussed Excess of jurisdiction - Error of law - Whether Industrial Court can include a reduction for mitigation and contributory conduct.*

The respondent was dismissed from his position as senior engineer with the title of vice president of the applicant company. The respondent applied to the Industrial Court for reinstatement or full compensation on the ground that he was dismissed without just cause or excuse and against the rules of natural justice.

The applicant however contended that the service of the respondent was terminated by one month's notice as per the terms and conditions of the respondent's contract with the respondent.

The Industrial Court found that the dismissal was effected without due and proper inquiry and such dismissal was therefore "against the established principles of natural justice" as the Industrial Court found that there was no inquiry at all and found in favour of the respondent.

The Industrial Court had when computating the award in favour of the respondent deducted 50% of the backwages found due as mitigation against loss and contributory conduct.

The applicant applied to the High Court for an order for *certiorari* to quash the said award.

Held:

[1] Applying *Dreamland Corp. (M) Sdn. Bhd. v. Choong Chin Sooi & Anor.*

... the right to a hearing or as it is sometimes called the observance of procedural safeguards ... do not apply to simple **master-servant relationship**.

[2] The Industrial Court had therefore asked itself the wrong question - this is an error of law thus the Industrial Court had exceeded its jurisdiction making the decision a nullity.

[3] The Industrial Court also made an error of law in making the reduction of 50% - hence this part of the award is a nullity.

[Order for certiorari granted.]

Case referred to:

Ernesty Sdn. Bhd. v. Transport Workers Union & Anor. [1986] 1 MLJ 18

For the applicant - Manjit Singh; M/s. Sri Ram, Zulkifly & Kumar
For the respondents - S. Selvanathan; M/s. Thevin, Chandran, Siva, Wong & Jamal

JUDGMENT

Zakaria Yatim J:

This was an application by Pembenaan Hashbudin (M) Sdn. Bhd. (the company) for an order for *certiorari* to quash award No. 247 of 1987 made by the Industrial Court on 18 August 1987 and costs.

The facts of the case are as follows: The first respondent was a senior engineer, who was given the title of vice-president of the applicant company.

In the morning of 18 June 1985 he found himself locked out of his office. On the same date he was given a memo by the company administrative officer to the effect that he, the first respondent was to go on leave from 18 June 1985 until 17 July 1985. The memo also referred to a conversation between the president of the company and the first respondent held in the morning of the same day in which the president told him that his service would be terminated after giving him one month's notice. The first respondent wrote a letter of protest to the president of the company on 24 June 1985. The text of the letter is as follows:

> Dear Encik Hasbudin,
>
> On the morning of 18 June 1985, the door to my room was pad-locked, thus preventing entry to my room to perform my duties. On inquiry, Mr. Ong Poh Seng the personnel/ administrative officer informed me that he was instructed by you to padlock the door the previous evening.
>
> At 10 a.m. on the 18th instant, you sent for me. You informed me that you were terminating my services. You thanked me for 'all what I have done for the company'. I asked you for your reasons. You did not give any reasons but you were apologetic. Up to now, I do not know why you have taken this course of action against me.
>
> I shall be grateful if you could let me know by return post, what it is that I have done so that I may be able to explain.
>
> I hope you will reply my letter giving me your explanation before the end of the month, i.e. 30 June 1985.
>
> Thanking you.
>
> I remain,
>
> Yours faithfully,
>
> Sgd: T. Sivagnanam

In response to this letter the administrative officer sent another memo to the first respondent. The memo reads as follows:

> I am instructed by Encik Hashbudin to tell again that since you are on leave, you should not be present in the office. If you insist on getting a termination of service letter from Encik Hashbudin, which he will not, before leaving the company premises, Encik Hashbudin will either call the police or engage temporary security guard to deter you from coming in. Thank you.

The first respondent told the Industrial Court that he was dismissed without just cause or excuse and against the rule of natural justice. He asked the Court to reinstate him in his former post in the company or alternatively to order full compensation to be paid to him.

The president of the company, in his evidence given in the Industrial Court, said that he found certain company confidential documents in the first respondent's room on 16 June 1985. He said the documents should not have been there. On the following day he called the first respondent and asked him for explanation but the president said the first respondent did not give him a satisfactory explanation. The company contended that it was a term of the first respondent's contract of employment that his service could be terminated with a month's notice or payment in lieu thereof. The company said that the service of the first respondent was terminated in accordance with his term of service.

The Industrial Court found that the dismissal of the first respondent by the company was effected without due and proper inquiry and such dismissal was therefore, to quote the award, "against the established principles of natural justice." According to the Industrial Court there was no inquiry at all. At p. 8 of the award the Industrial Court said that it was true that the first respondent was a most difficult man to deal with. The Industrial Court had ample opportunity to observe him and came to this conclusion during his conduct of his own case over the five days of hearing. The Industrial Court also found that the first respondent had the experience of a previous case of unjustified dismissal against the previous employer in another division of Industrial Court whereby he won an award of RM64,544.82.

The Industrial Court came to the following conclusion as stated in the award:

> The inescapable conclusion must be that the dismissal was without just cause or excuse and procedurally in breach of the principles of natural justice, to which every workman is entitled as of right when his employer proceeds to deprive him of his employment on grounds of misconduct.

The Industrial Court accordingly made the following award:

1)	Backwages from the date of dismissal, i.e. 18 June 1985 to the date of last day of hearing, i.e. 30 April 1987 = 22 months and 12 days @ RM5,500 per month ...	RM123,199.99
	Less 50% as mitigation against loss and contributory conduct ...	RM 61,599.99
2)	Compensation in lieu of reinstatement of two months' salary = RM5,500 x 2	RM 11,000
3)	Leave not taken + 30 days	RM 5,500
4)	Expenses incurred by claimant not yet paid by company - (Court Exhibit CL50) ...	RM 8,772.20
	c/forward ...	RM 86,872.20
5)	Unpaid salary from 1 June 1985 to 18 June 1985 + 18/30 x RM5,500 ...	RM 3,299.99
	Total ...	RM 90,172.19

Mr. Manjit Singh, Counsel for the applicant submitted that the Industrial Court had asked the wrong question when it made the award on the basis that the principle of natural justice had not been complied with.

What then is the right question for the Industrial Court to consider in the instant case. In *Dreamland Corpn. (M) Sdn Bhd v. Choong Chin Sooi & Anor*. [1988] 1 CLJ (Rep) 39, the Supreme Court said:

> ... First, have the employers shown on the balance of probabilities that they would have taken the same course had they held an inquiry, and had they received the same information which that inquiry would have produced? Secondly, have the employers shown that in the light of the information which they would have had, had they gone through the proper procedure, they would have been behaving reasonably in still deciding to dismiss.?

In the same judgment the Supreme Court ruled that the principle of natural justice did not apply to a simple master-servant proceeding. The Court said,

> The short answer to Mr. Lobo's argument is that the right to a hearing or as it is sometimes called the observance of procedural safeguards are only applicable in respect of a hearing before an administrative tribunal and similar quasi judicial tribunals performing judicial functions but do not apply to simple **master-servant proceedings**, such as the present case. (Emphasis added)

In the light of the decision in the *Dreamland's* case *supra*, it is clear that the Industrial Court had asked the wrong question. This is an error of law and the Industrial Court had accordingly exceeded its jurisdiction.

Since the Industrial Court had asked the wrong question, the result would be that its decision would be a nullity. See *Ernesty Sdn. Bhd. v. Transport Workers Union & Anor*. [1986] 1 MLJ 18. In that case, Mohamed Azmi SCJ said at p. 24:

> There is no degree of nullity and if there is an error of law on which the Industrial Court's award depends, the remedy of *certiorari* should not be excluded by s. 33B(1). In other words, if there is an error of law on which the award of the Industrial Court is founded, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity, and this must be construed as a nullity resulting from the Industrial Court doing or failing "to do something in the course of the inquiry which is of such a nature that its decision is a nullity" as referred to by Lord Reid at p. 171 in *Anisminic's* case, or the Court "having asked themselves the wrong question" as referred to be Lord Diplock at p. 187 in *re Racal Communications Ltd.*

Mr. Manjit Singh further submitted that the award of "less 50% as mitigation against loss and contributory conduct ..." was wrong. He added that there was either a dismissal or no dismissal. In my opinion, here too, there was an error of law. The Industrial Court had therefore exceeded its jurisdiction by making that part of the award. I find that part of the award was a nullity. See *Ernesty's* case *supra*.

For the reasons stated above I ordered that award 247/87 dated 18 August 1987 be quashed with costs.

Also found at [1989] 1 CLJ 235